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IN THE
COURT OF APPEALS OF INDIANA

PAUL WINTERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0609-CR-508
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Priscilla Fossom, Judge Pro Tempore
Cause No. 49G04-0602-FB-027658

NOVEMBER 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Paul Winters ("Winters") appeals his convictions for robbery as a Class B felony and three counts of criminal confinement, each as a Class B felony. We affirm.

ISSUES

Winters raises two issues, which we restate as:

I. Whether the trial court abused its discretion by admitting into evidence two photo arrays that were used to identify Winters; and

II. Whether Winters' convictions for robbery and criminal confinement violate the Indiana Constitution's prohibition against double jeopardy.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the jury's verdict reveal that on January 22, 2006, Winters and another male went to a Domino's pizza store at 38th and Central in Indianapolis, where Samantha Carver ("Carver"), Christopher Ford ("Ford"), Elizabeth Hagedorn ("Hagedorn"), and Anthony Garrett ("Garrett") were working. Carver saw Winters and the other man at the door, "buzzed them in," went to the front of the counter, and asked them if they had a pizza order. Transcript at 82. Winters responded, "No. I'm here to rob you." *Id.* at 84. Winters then opened his trench coat, revealed a "really long" silver shotgun or rifle, but did not pull out or point the gun at anyone. *Id.* at 85. Ford, the Domino's manager who was nearby making pizzas, came over to the counter, grabbed the cash drawer, and set it on the counter. Winters and the other man grabbed the money, which was about $50.00, from the cash drawer. Winters told the employees to "[g]et on

the floor," and the other man went behind the counter and demanded money from the safe. *Id.* Carver, Hagedorn, and Garrett got down on the floor. Ford walked to the safe, "set the safe," and lay on the floor. *Id.* at 50. When Ford told the men that there would be a fifteen-minute delay before the safe could be opened, Winters said they could not wait that long. Winters threatened to kill the employees if they got up, and then he and the other man left the store. The employees stayed on the ground for several minutes "because no one wanted to die" and then called the police. *Id.* at 51.

Indianapolis Police Officer Zachary Taylor arrived on the scene, took the employees' initial statements, and requested a robbery detective. Detective Douglas Cook went to the Domino's store and individually interviewed the employees. After the employees gave Detective Cook a description of the robbers, Detective Cook took Ford to police headquarters to look at some photographs in an attempt to identify the robbers. Detective Cook entered information obtained from Ford regarding the robber's race, height, weight, and age into the police department's "X-image computer," and the computer produced a series of fifty to one hundred photographs. *Id.* at 165. Detective Cook left the room, and Ford scrolled through the photos on the computer. When Ford saw a photograph of Winters, he identified Winters as one of the robbers and indicated that he was "100 percent positive" of the identification. *Id.* at 168. Ford was not able to identify the other man that helped Winters rob the store.

Based on Ford's identification, Detective Cook compiled a six-person photo array containing Winters' photo as well as five other men who had a "similar likeness" to Winters. *Id.* at 171. The men in the photo array were black men of approximately the

same age with bald or shaved heads, rounded faces, and some facial hair. Detective Cook took Ford back to the Domino's store and then transported Carver to the police department, where he had Carver look at the six-person photo array. Detective Cook placed the photo array on the table in front of Carver, told her that "this photo array may or may not contain a photograph of the suspect who just robbed you," and then left the area. *Id.* at 172. Carver then identified the photograph of Winters as the man that robbed the store and that she was "100 percent positive" of her identification. *Id.* at 193.

Detective Cook then took Carver back to the pizza store and asked Hagedorn to go to the police department. Hagedorn went to the police department, where Detective Cook showed Hagedorn a six-person photo array containing a different photograph of Winters as well as five other men with similar characteristics as Winters. Detective Cook placed the photo array on the table in front of Hagedorn and told her that "this photo array may or may not contain a photograph of the suspect who just robbed you." *Id.* at 177. Hagedorn looked at the photo array and "immediately" pointed to the photograph of Winters. *Id.*

The State charged Winters with Count I, robbery as a Class B felony, and Counts II through V, criminal confinement, each as a Class B felony.[1] On the morning of trial, Winters filed a motion in limine, requesting, in part, that the State and its witnesses be precluded from referring to the terms "mug shots" and "photo arrays" because those terms inferred that Winters had a criminal history. Appellant's Appendix at 45;

[1] Count II was charged for the confinement of Ford, Count III for the confinement of Carver, Count IV for the confinement of Hagedorn, and Count V for the confinement of Garrett.

Transcript at 10. While arguing the motion to the trial court, Winters' counsel stated that "identity is the issue" and that Winters was "not denying there was a robbery, [but] just saying [he] didn't do it." Transcript at 8. The trial court granted the motion in limine with regard to the term "mug shots" but denied the motion with regard to the term "photo arrays." Winters informed the trial court that he "intend[ed] at the appropriate time to move to suppress the photographs and so at that appropriate time then we may need a separate evidentiary [hearing]." Transcript at 29. Winters argued that his reason for wanting the arrays to be suppressed was because they were "somewhat suggestive." *Id.* at 30.

During the jury trial, Ford identified Winters in court while he was testifying regarding the facts of the robbery. Ford then testified that after the robbery, he went down to the police department where he identified Winters from the numerous photographs that he reviewed at the police station.

During Carver's testimony, she indicated that Detective Cook had shown her a six-person photo array, and when the State started to show her State's Exhibit 3, the photo array from which Carver identified Winters, Winters' counsel asked to approach the bench. Winters objected to the photo array because it "indicate[d] that they're [sic] from the Indianapolis Police Department" and was "suggestive of a mug shot." Transcript at 87. The prosecutor indicated that it was not offering the photo array into evidence at that time and was waiting until Detective Cook testified. The State suggested they take a break prior to Detective Cook's testimony and review the case law then. The trial court, noting that the evidence already showed that the photos came from the police

department and that Detective Cook was going to testify how it was made up, denied Winters' objection.

When Hagedorn testified, she identified State's Exhibit 4 as the group of photographs that she looked at with Detective Cook at the police department and testified that she identified Winters from the photos. Following Hagedorn's testimony, the trial court excused the jury so that the parties could discuss Winters' objection to the photo arrays prior to Detective Cook's testimony. Winters' counsel then argued that he wanted "a suppression of the photo arrays, i.e. which are mug shots, as being somewhat suggestive," Transcript at 129, and that there was an "unacceptable risk [that] the identification process was conducted in such a way that it created a substantial likelihood of irreparable misidentification." *Id.* at 147. The State then presented testimony from Detective Cook to "lay the foundation for the admissibility" of the photo arrays. *Id.* at 130. Detective Cook explained how he created the photo arrays and selected other individuals that resembled Winters, how he used different photographs of Winters for the three victims when they did their identifications, and the procedure that he used when each victim separately reviewed the photos. The trial court then denied Winters' objection regarding the photo arrays being unnecessarily suggestive. (Tr. P. 152-53)

Winters' counsel then stated that he had a "second aspect" to his objection, *id.* at 153, specifically that the photo arrays contained the words "Indianapolis Police Department" and a lineup identifier on the top of the photo array sheet and thus indicated that the photographs in the photo arrays were mug shots and would "infer some criminality on [Winters'] past," *id.* at 156. Winters' counsel suggested that "the simple

solution [would] be to use scissors and cut off the IPD language or any of that at the top." *Id.* at 154. The trial court overruled Winters' objection that the photo arrays indicated that they were mug shots and noted that Winters' objections regarding the photo arrays were preserved for appeal.

The parties then discussed the motion in limine restricting any reference to the term "mug shots," and Detective Cook asked the trial court for clarification on how he should explain to the jury his selection process for the photographs in the photo arrays. The prosecutor explained that the detective should only refer to mug shots as "photos," "photo[s] on a computer," or "X-image photos." *Id.* at 158. The trial court then reconvened the jury, and the State called Detective Cook to testify.

During Detective Cook's testimony, he started to explain how he entered the descriptive parameters into the "X-image computer," and Winters objected that the term X-image would indicate to the jurors that the photographs were mug shots. *Id.* at 165. The trial court denied Winters' objection. When the prosecutor asked Detective Cook what he had Ford do after he had identified Winters from the photographs on the computer, Detective Cook stated:

> Well, prior to looking at the second mug book, we have a procedure – correction, we have to save the pictures that are on this computerized image, and I saved not only the list but the actual printout of the pictures because I ha[d] to have Mr. Ford identify, mak[e] identifying marks on those series of pictures.

Id. at 168-169. Winters approached the bench, and the following side bar conversation occurred:

> [Winters' Attorney]: I guess for the record, I hate to admit, but since he has used ----
>
> [Prosecutor]: Did he use the "m" word?
>
> THE COURT: Yes, do you want me to direct the jury or do you want to – do you want to draw attention to it? I mean --
>
> [Winters' Attorney]: I think (inaudible).
>
> THE COURT: I understand that. Your objection is reserved (inaudible).
>
> [Prosecutor]: (Inaudible).
>
> THE COURT: Okay, okay, and we'll discuss it.
>
> [Winters' Attorney]: But I still think it's pertinent to the issues and think this calls for a mistrial.
>
> THE COURT: Certainly. I appreciate that. Thank you.

Id. at 169-170.

Detective Cook then testified that Carver identified Winters from State's Exhibit 3, the photo array that Carver saw on the day of the robbery, and when the State moved to admit State's Exhibit 3, Winters' counsel stated, "Judge, we've already discussed pursuant to previously, so no response." *Id.* at 173. The trial court replied, "Okay. I will admit that, State-Exhibit No. 3 pursuant to the discussion that was held before. Thank you." *Id.* After Detective Cook testified that Hagedorn had identified Winters from State's Exhibit 4, the photo array that Hagedorn saw on the day of the robbery, the State moved to admit State's Exhibit 4. Winters' counsel stated, "Same situation on this, Judge," and the trial court replied that it would "admit it pursuant to our discussion earlier." *Id.* at 177.

Following the State's presentation of evidence, Winters moved for directed verdict on all counts, and the trial court granted Winters' motion on Count V, the criminal confinement charge relating to the confinement of Garrett. Thereafter, the jury found Winters guilty of robbery and the three remaining counts of criminal confinement as charged. The trial court sentenced Winters to an advisory term of ten years on each of his four Class B felony convictions ordered that these sentences be served concurrently.

DISCUSSION AND DECISION

I. PHOTO ARRAYS

Winters argues that trial court abused its discretion by admitting into evidence two photo arrays that were used to identify Winters following the crime. Because the admission of evidence falls within the sound discretion of the trial court, we review the admission of photographic evidence for an abuse of discretion. *Bradley v. State*, 770 N.E.2d 382, 385 (Ind. Ct. App. 2002), *trans. denied*. Photographic evidence that is relevant may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice.[2] *Id.*; *see also* Ind. Evidence Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger

[2] We note that our Indiana Supreme Court has explained that "[m]ug shots . . . are admissible if (1) they are not unduly prejudicial and (2) they have substantial independent probative value." *Boatright v. State*, 759 N.E.2d 1038, 1042 (Ind. 2001). However, our Supreme Court has also noted that this test governing admission of mug shots, while similar to Indiana Rule of Evidence 403, was derived from cases decided before the adoption of the Indiana Rules of Evidence and that "[t]he rules themselves set forth the current formulation to the extent they address an issue specifically." *See Wheeler v. State*, 749 N.E.2d 1111, 1114 n.1 (Ind. 2001).

of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.").

On the day that the robbery occurred, Ford, Carver, and Hagedorn each separately went to the police department to try to identify the person who had robbed the pizza store. Ford identified Winters' photograph from numerous photographs on the police department's X-image computer, while Carver and Hagedorn each identified Winters from two different six-person photo arrays, and each stated positively that Winters was the man they had seen in the pizza store. At trial, Ford, Carver, and Hagedorn identified Winters as the person who robbed the pizza store and testified how they had chosen his photograph from the police department's photographs and photo arrays. During Detective Cook's testimony, the trial court admitted the photo arrays into evidence over Winters' objection.[3]

Winters contends that the trial court erred by allowing the State to introduce into evidence State's Exhibits 3 and 4, the photo arrays from which Hagedorn and Carver identified Winters as the perpetrator following the robbery. He specifically argues that the photographs gave the appearance of being a mug shot, which suggested to the jury that Winters had a prior criminal record, and that the photo array evidence was cumulative of Ford, Hagedorn, Carver, and Detective Cook's testimony that the victims

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[3] The State argues that Winters has waived his argument regarding the admission of the photo arrays because he did not object to Ford's testimony regarding how he identified Winters from police records. We disagree. Ford did not identify Winters by a photo array, and the photo arrays were not discussed during Ford's testimony; thus, there would not have been any reason to object to the photo arrays during Ford's testimony. As indicated in the facts above, Winters clearly objected to the admission of the photo arrays. Thus, we will review the merits of his argument.

identified Winters from the photo arrays.[4] Winters asserts that the photo arrays coupled with Detective Cook's reference to the "second mug book" prejudiced him because they suggested to the jury that he had previously been "in trouble with the law[.]"[5] Appellant's Brief at 12.

The State argues that the photo arrays were not unduly prejudicial because the photographs in the photo arrays did not have any obvious identifying information that they were mug shots and because there was testimony explaining that the photographs were generated by the Indianapolis Police Department's computer. The State acknowledges Detective Cook's reference to the mug book but contends that "it is clear from the transcript that this reference was purely accidental and skillfully repaired by the detective" and that it is unlikely that the detective's mistaken reference provided the jury with an inference that Winters had a criminal history. Appellee's Brief at 12. Finally, the State argues that the photo arrays were highly probative because identity was the main issue at trial. We agree with the State.

"[W]hile the use of mug shots is disapproved because the jury may infer criminal history on part of the defendant, the use of mug shots is not improper when relevant and necessary to identify the perpetrator of a crime." *Bradley*, 770 N.E.2d at 386. We have previously held that when the perpetrator's identification is at issue, the photographs from a photo array have probative value. *See Farris v. State*, 818 N.E.2d 63, 71 (Ind. Ct.

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[4] On appeal, Winters does not argue, as he did at trial, that the photo arrays were inadmissible because they were unduly suggestive.

[5] Winters makes no argument on appeal regarding the trial court's denial of his motion for mistrial following Detective Cook's reference to the mug book.

App. 2004), *trans. denied*; *Jenkins v. State*, 677 N.E.2d 624, 626 (Ind. Ct. App. 1997). Our Indiana Supreme Court has also held that the probative value of photographs in a photo array is significant when the array was used to explain how a victim came to identify a defendant. *See Powell v. State*, 714 N.E.2d 624, 629 (Ind. 1999).

Here, the main issue at trial was the eyewitness identification of Winters, and the photo arrays were used to help explain to the jury how the victims came to identify Winters. Indeed, the identification evidence against Winters was crucial because there was no other evidence connecting Winters to the robbery. Therefore, the mug shots used in the photo arrays did have significant probative value. *See Powell*, 714 N.E.2d at 629; *Farris*, 818 N.E.2d at 71; *Jenkins*, 677 N.E.2d at 626.

Furthermore, this probative value was not substantially outweighed by the danger of unfair prejudice to Winters. We have previously noted that a "typical mug shot" shows the "well-known frontal and profile view of a person with prison numbers and legend thereon referring to arrests or convictions[.]" *Hyppolite v. State*, 774 N.E.2d 584, 593 (Ind. Ct. App. 2002), *trans. denied*. Additionally, in *Farris*, we explained that "[w]hen the State has made an effort to disguise the nature of the photographs by redacting criminal information and any other information which obviously identifies the photograph as a mug shot, the photograph is not unduly prejudicial." *Farris*, 818 N.E.2d at 71 (internal quotations omitted).

Here, the photographs in the photo arrays were not "typical mug shots," and the State did make an effort to disguise the nature of the photos, as no names or criminal information for the individuals photographed was included. The photographs in the

photo arrays were head-on view photos, and each individual was clearly wearing street clothes. While the photo arrays contained the words "Indianapolis Police Department," there was testimony explaining that Detective Cook compiled these arrays from the police department's computer system. In regard to Detective Cook's reference to the "second mug book," we have previously explained that the mere mention of "mug shots" is not reversible error per se, and reversal is not required if the reference is unintentional or the evidence of guilt is strong. *Vanzandt v. State*, 731 N.E.2d 450, 454 (Ind. Ct. App. 2000), *trans. denied*. We agree with the State that Detective Cook's reference to the "second mug book" was unintentional and that it is unlikely that the detective's mistaken reference had a significant impact upon the jury. Even assuming that the photo arrays and reference to the mug book slightly prejudiced Winters, any such prejudice is outweighed by the probative value of this evidence. Because the probative value of the photo arrays is not substantially outweighed by the danger of unfair prejudice, we cannot say that the trial court abused its discretion by admitting the photo arrays into evidence. *See Cason v. State*, 672 N.E.2d 74, 75 (Ind. 1996) (holding that the trial court properly admitted a photo array where the photographs were not unduly prejudicial because they contained "none of the potentially damning features of mug shots, like information about prior criminal charges or nameplates hung around the suspects' necks" and where the photographs had probative value because the perpetrator's identify was at issue); *see also Farris*, 818 N.E.2d at 72 (affirming the trial court's admission of the photo arrays into evidence).

II. DOUBLE JEOPARDY

Winters next argues that his convictions for robbery and criminal confinement of Ford violated the Indiana Constitution's prohibition against double jeopardy.[6] The Indiana Double Jeopardy Clause provides, in relevant part, that "No person shall be put in jeopardy twice for the same offense." Ind. Const. Art. I, § 14. "Indiana's Double Jeopardy Clause was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). Double jeopardy analysis under the Indiana Constitution involves the dual inquiries of the "statutory elements test" and the "actual evidence test," as generally described in *Richardson*. *Davis v. State*, 770 N.E.2d 319, 323 (Ind. 2002), *reh'g denied*. Two or more offenses are the "same offense" and violate the state double jeopardy clause if, "with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Richardson*, 717 N.E.2d at 49. Winters does not argue the statutory elements test; therefore, we will analyze Winters' claim under the actual evidence test.

"The actual evidence test prohibits multiple convictions if there is 'a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.'" *Davis*, 770 N.E.2d at 323 (quoting *Richardson*, 717 N.E.2d at 53). The Indiana Supreme Court explained that "under the *Richardson* actual evidence

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[6] The State charged Winters with the robbery of Ford, and Winters does not challenge his criminal confinement convictions in relation to Carver and Hagedorn.

test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." *Guyton v. State*, 771 N.E.2d 1141, 1142 (Ind. 2002) (quoting *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002)). In applying the actual evidence test, this court must identify the essential elements of each offense and evaluate the evidence from the jury's perspective. *Spivey*, 761 N.E.2d at 832. "Generally, double jeopardy does not prohibit convictions of confinement and robbery when the facts indicate that the confinement was more extensive than that necessary to commit the robbery." *Merriweather v. State*, 778 N.E.2d 449, 454 (Ind. Ct. App. 2002) (citing *Hopkins v. State*, 759 N.E.2d 633, 639 (Ind. 2001); *Thy Ho v. State*, 725 N.E.2d 988, 993 (Ind. Ct. App. 2000)).

Winters contends that his convictions for robbery and criminal confinement of Ford constitute double jeopardy because there is a reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of each of the charges. In support of his argument, Winters relies on *Vanzandt*.

In *Vanzandt*, we determined that the defendant's robbery and confinement convictions did violate the prohibition against double jeopardy. The evidence in *Vanzandt* revealed that the defendant, while armed with a gun, ordered the victims to lie on the floor while the defendant took money from a cash register and then fled in one victim's car. *Vanzandt*, 731 N.E.2d at 455. We concluded that compelling the victims to lie on the floor was not separate and apart from the force used to effectuate the robbery. *Id.* Because the defendant demonstrated there was a reasonable possibility that the jury

used the same evidentiary facts to establish criminal confinement of the victim as it did the robbery of that same victim, we concluded that conviction of both violated the Indiana Double Jeopardy Clause and, therefore, vacated the conviction for criminal confinement. *Id.* at 456.

The State argues that the facts of this case are distinguishable from *Vanzandt* because the evidence from Winters trial shows that his crime of robbery was complete before he confined Ford. We agree with the State.

Here, the evidence reveals that after Winters and his accomplice went into the pizza store, Winters announced his intention to rob the store and showed that he had a gun but did not point it at anyone. Ford set the cash drawer on the counter, and Winters and the other man took the money from the cash drawer. At that point, the robbery was complete. Winters then told the employees to get on the floor, and Winters' accomplice went behind the counter and demanded money from the safe. While Carver, Hagedorn, and Garrett got down on the floor, Ford walked to the safe, "set the safe," and lay on the floor. *Transcript* at 50. Upon hearing that there would be a fifteen-minute delay before the safe could be opened, Winters said they could not wait that long, threatened to kill the employees if they got up, and then he and the other man left the store. Thus, the evidence shows that there was a confinement separate from the robbery, and we conclude that there is no reasonable possibility that the jury used the same evidentiary facts to convict Winters of the robbery and criminal confinement of Ford. *See e.g.*, *Merriweather*, 778 N.E.2d at 455 (holding that the defendant's convictions for robbery and criminal confinement did not violate the actual evidence test where the evidence

revealed a confinement separate and apart from the robbery); *see also Boatright v. State*, 759 N.E.2d 1038, 1044 (Ind. 2001) (affirming the defendant's convictions of robbery and confinement because the robbery conviction and the confinement conviction were supported by two clearly separate acts); *Thy Ho*, 725 N.E.2d at 993 (finding no double jeopardy violation for convictions of criminal confinement and robbery where the evidence showed that victim's confinement was more extensive than necessary to commit robbery).

CONCLUSION

For the foregoing reasons, we affirm Winters' convictions for robbery and criminal confinement.

Affirmed.

RILEY, J., concurs.

DARDEN, J., dissenting with separate opinion.

IN THE

COURT OF APPEALS OF INDIANA

PAUL WINTERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0609-CR-508
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

DARDEN, Judge, dissenting

I respectfully dissent as to the holding that Winters' convictions for robbery and criminal confinement did not violate the Indiana Constitution's prohibition against double jeopardy.

Given the facts, I respectfully disagree that Winters had completed the robbery before confining the employees and proceeding to attempt to commit a second robbery. The crime of robbery, as charged, was the taking of money from Domino's pizza store. Merely the taking of the cash drawer from the counter and the attempted taking of money from the safe of Domino's pizza store was part and parcel of the continuing offense of the same robbery. Thus, as was the case in *Vanzandt*, I believe that compelling the employees "to lie on the floor is not separate and apart from the force used to effect the robbery." 731 N.E.2d at 455. Accordingly, I would reverse Winters' convictions for criminal confinement.